

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CRIMINAL WRIT PETITION NO.738 OF 2003

D.N. Punamiya,
401, Neelkant Apartments
Co-operative Housing
Society Ltd., 'A' Wing,
Goculdas Pasta Road,
Dadar, Mumbai-400 014. Petitioner

- Versus -

The State of Maharashtra
(through Bhoiwada Police
Stn.) Respondent

Ms M.V. Thakkar with Shri S.V. Thakkar for
the Petitioner.

Shri B.H. Mehta, Addl. Public Prosecutor,
for the Respondent-State.

CORAM: R.M.S. KHANDEPARKAR, J.

DATED: FEBRUARY 10, 2005

JUDGMENT:

1. Heard. Rule. By consent, the rule is made returnable forthwith.

2. The petitioner challenges the issue of process by the learned Metropolitan Magistrate, 41st Court, Mumbai, in Criminal Case No.45/P/2000.

3. Pursuant to the chargesheet being filed under Section 53(1)(7) of the Maharashtra Regional and Town

Planning Act, 1966, hereinafter referred to as "the said Act", for failure to restore a toilet block in the Neelkant Apartments Co-operative Housing Society Limited, situated Goculdas Pasta Road, Dadar, Mumbai, the process came to be issued against the petitioner and one Shri S.S. Rane. The complaint in that regard was preceded by a notice dated 14-1-2000 from the Development Authority addressed to Shri S.S. Rane, Chairman, the accused No.1 in the said case, calling upon him to restore the said toilet block in the premises of the said society within 30 days from the receipt of the said notice. The notice period expired on 14-2-2000 and yet no steps were taken by Shri Rane to comply with the said notice, and the Authority therefore lodged the F.I.R. and consequently the said chargesheet was filed and the process was issued against the said Rane and the petitioner. Upon receipt of the summons, the petitioner took out an application before the learned Metropolitan Magistrate for recall of the process or to discharge the petitioner on the ground that no notice as required under Section 53(1)(7) of the said Act was issued to the petitioner at any point of time and therefore the prosecution against the petitioner was not maintainable. Simultaneously, Shri Rane also took out another application for his discharge on the ground that the petitioner was the Chairman of the concerned housing society at the time the toilet

block was demolished and therefore he cannot be prosecuted for non-compliance of the direction by the Authority. By the common order dated 25-9-2001 the learned Metropolitan Magistrate while allowing the application of Shri S.S. Rane, dismissed the application filed by the petitioner. The matter was carried in Criminal Revision Application No.813 of 2001 before the Court of Sessions at Mumbai, without any success as the same was dismissed by the order dated 10-1-2003. The petitioner, therefore, by this present petition, while challenging the said orders, is seeking to quash the said criminal proceedings against him.

4. The sole ground on which the proceedings are challenged is that no notice as required under Section 53(1) of the said Act had ever been issued to the petitioner and in the absence of such notice, no prosecution would lie against him under Section 53(6) & (7) of the said Act.

5. The learned Advocate for the petitioner drawing attention to the specific finding by the learned Metropolitan Magistrate in his order dated 25-9-2001 to the effect that for mere non-issuance of notice to the petitioner, the entire prosecution case cannot be rejected or thrown out, and that the notice was issued to the said accused Shri S.S. Rane alone as against the

finding of the revisional Court that the record reveals that the notice was duly served and yet the wrong had remained to be undone, submitted that the. F.I.R. lodged on behalf of the Authority clearly discloses that the notice dated 11-1-2000 under Section 53(1) of the said Act was addressed to and served on accused Shri S.S. Rane alone, and in fact was accepted by the staff member of Shri Rane, namely, Smt. Suchitra T. Chavan and the notice period had expired on 14-2-2000. Indeed the copy of the notice issued under Section 53 also discloses that it was addressed to Shri S.S. Rane, Chairman of the Society. Referring to these undisputed materials on record, the learned Advocate for the petitioner submitted that resort to Section 53(6) & (7), which empowers prosecution, is permissible only upon failure to comply with the notice issued under Section 53(1) and not otherwise and this is clear from the provisions comprised under Section 53(6) r/w sub-sections (1) and (7) of Section 53 of the said Act. The learned A.P.P., on the other hand, has submitted that mere non-service of the notice in the individual name would not be sufficient either to recall the process or to discharge the petitioner from his criminal liability for the act complained of and that he could prove his innocence in the Court of prosecution. He further submitted that non-service of notice would be purely a technical lapse and that would not come in the

way of the Authority to prosecute the petitioner.

6. The Section 53 of the said Act deals with the power to require removal of unauthorised development. The sub-section (1) thereof provides that where any development of land has been carried out as indicated in sub-section (1) of Section 52, the Planning Authority may, subject to the provisions of Section 53, serve on the owner a notice requiring him, within such period, being not less than one month, as may be specified therein after the service of the notice, to take such steps as may be specified in the notice. It further provides that in cases specified in Clause (a) or (c) of sub-section (1) of Section 52, the notice can be to restore the land to its condition existing before the said development took place. The Clause (a) of Section 52(1) deals with any development carried out without permission required under the said Act and the Clause (c) refers to any development carried out after the permission for the development has been revoked. The proviso to sub-section (1) of Section 53 of the said Act provides that where the notice requires the discontinuance of any use of land, the Planning Authority shall serve a notice on the occupier also. The sub-section (2) of Section 53 clarifies that for the purpose of sub-section (1), the notice may require the demolition or alteration of any building or works, the

carrying out on land of any building or other operations; or the discontinuance of any use of land. In terms of sub-section (3) of Section 53 the aggrieved person on receipt of notice within the specified period thereunder can apply for permission under Section 44 for retention on the land of any building or works or for the continuance of any use of the land to which the notice relates pending the final determination or withdrawal of application. It also provides that mere notice shall not affect the retention of buildings or works or the continuance of such use. The sub-section (5) provides that if the permission applied for is granted, the notice shall stand withdrawn; but if the permission applied for is not granted, the notice shall stand. The sub-sections (6) and (7), which are very relevant for the purpose of decision in the matter, provide thus:-

"(6) If within the period specified in the notice or within the same period after the disposal of the application under sub-section (4), the notice or so much of it as stands is not complied with, the Planning Authority may -

(a) prosecute the owner for not complying with the notice, and where the

notice requires the discontinuance of any use of land any other person also who uses the land or causes or permits the land to be used in contravention of the notice; and

(b) where the notice requires the demolition or alteration of any building or works carrying out of any building or other operations, itself cause the restoration of the land to its condition before the development took place and secure compliance with the conditions of the permission or with the permission as modified by taking such steps as the Planning Authority may consider necessary including demolition or alteration of any building or works or carrying out of any building or other operations; and recover the amount of any expenses incurred by it in this behalf from the owner as arrears of land revenue.

(7) Any person prosecuted under clause (a) of sub-section (6) shall, on conviction, be punished with

imprisonment for a term which shall not be less than one month but which may extend to three years and with fine which shall not be less than two thousand rupees but which may extend to five thousand rupees, and in the case of a continuing offence with a further daily fine which may extend to two hundred rupees for every day during which such offence continues after conviction for the first commission of the offence."

7. Plain reading of the above provisions of law discloses that in cases of any development within the territorial limits of the planning authority without the prior permission under the said Act or after revocation of such permission granted under the said Act, if carried out, then it could be ordered to be removed as well as direction can be issued for restoring the land to the condition which existed prior to the concerned development. The authority can also direct to restore such status quo ante within specified period. However, the specified period shall not be less than one month. Such a direction can be issued to the owner of the concerned development. The term "owner" would obviously disclose the person in whom the ownership of the

property or the structure vests. The Section 2(18) of the said Act, however, widens the scope of the said expression "owner" by defining it to mean to include any person for the time being receiving or entitled to receive, whether on his own account or as agent, trustee, guardian, manager or receiver for another person or for any religious or charitable purpose, the rents or profits of the property in connection with which it is used. In other words, it is not only the person in whom the title of the property stands, but even his agent or person acting on behalf of the owner for the purpose of receipt of rent or profits from such property would be the owner for the purpose of the said expression under Section 53 of the said Act. Undoubtedly, in the case of co-operative societies, either the Chairman as well as the other members of the managing committee thereof would be the owners of the property of the society for the purpose of the said section.

8. It is well-settled that expressions in a penal provision of law are to be construed strictly and in favour of the subject. The rules of interpretation clearly require that the language of a statute should be so construed that no case shall be held to fall within it which does not come within the reasonable interpretation of the statute, and in case of any doubt

the cardinal principle is that the construction favourable to the subject should be preferred.

9. Where an authority is bestowed with certain power under a statute and for the execution of such power certain requirements or formalities are prescribed under the same statute, it is neither unjust nor incorrect to expect rigorous observance of such requirements or formalities by such authorities while exercising their powers. The relevant provision of law clearly speaks of notice of minimum 30 days to comply with the direction which the Authority is empowered to issue under such notice. The provision does not contemplate prosecution during the subsistence of such period nor in case of compliance of direction within the stipulated period of time. In other words, non-compliance of direction is precondition for the prosecution. Unless the said precondition is satisfied, there cannot exist criminal liability of the owner and the Authority is not entitled to initiate prosecution under Section 53(6) and (7) of the said Act. Obviously occasion for non-compliance of direction would arise only in case of the party being made aware of the direction. The mode statutorily specified for making the party aware of the direction is only by way of notice under Section 53(1). Being so, issuance of such notice with the necessary direction and non-compliance thereof are pre-requirements for

prosecution under Section 53(6) and (7) of the said Act.

10. Undisputedly, in the case in hand, the development is in the property of the society. The notice which was issued to Shri S.S. Rane was in the capacity as the Chairman of the society. It is pertinent to note that there was no notice separately issued to the society as such. In fact, the notice was addressed thus:-

Shri S.S. Rane (Chairman)
1.A Neelkanth Apartment,
Gokuldas Pasta Road,
Dadar, Mumbai 400 014."

Even the contents of the notice disclose that the allegations were against Shri S.S. Rane, Chairman of the society. The third para thereof clearly recorded that "it has been reported to me that you have commenced, carried out development described in the Schedule appended below:" Even the warning regarding prosecution was directed to Shri S.S. Rane in the sense it recorded that "Please note that on failure to comply with the aforesaid requisition, you will be liable for prosecution under the said act"

11. It is not in dispute that no notice was issued to the petitioner in relation to the alleged development.

Being so, the petitioner had no occasion to comply with the directions stated to have been issued to Shri S.S. Rane. The notice issued to Shri Rane can by no stretch of imagination be said to be good for the petitioner nor that is the case of the respondents. The Section 53(6), quoted above, clearly reveals that the criminal liability of the owner arises only upon the failure to comply with the directions in the notice and not otherwise. Being so, if there is no notice issued to the party, there cannot be any occasion for prosecution of such person. In fact, the sub-section (7) clearly speaks of prosecution under the sub-section (6)(a). The sub-section (6)(a) empowers the Authority to prosecute the owner only on failure to comply with the notice. Being so, in the case in hand, once it is not in dispute that no notice was served upon the petitioner in terms of the provisions of law comprised under Section 53(1) of the said Act, the petitioner never incurred any criminal liability for the purpose of he being made to face the prosecution under Section 53(6) or to be punished under sub-section (7) thereof for the alleged development. The petitioner, therefore, is justified in contending that the prosecution was without any occasion for the same against the petitioner. In such cases, the prosecution being in the absence of jurisdictional fact which is otherwise needed for the Magistrate to take cognizance of the complaint, question of asking the

party to face the prosecution and defend his right does not arise at all. On this count itself, the process issued against the petitioner in Criminal Case No.45/P/2000 by the learned Metropolitan Magistrate is liable to be quashed and set aside.

12. For the reasons stated above, therefore, the petitioner is justified in contending that there was no case for prosecution of the petitioner under Section 53(6) and (7) of the said Act for the alleged non-compliance of the direction issued to Shri S.S. Rane under the notice dated 14-1-2000. Hence, the petition succeeds. While setting aside the orders issued by the learned Magistrate and the learned Sessions Judge, the process issued against the petitioner in Criminal Case No.45/P/2000 on the file of the learned Metropolitan Magistrate, 41st Court, Mumbai is hereby quashed and the complaint against the petitioner is dismissed. The rule is made absolute in above terms with no order as to costs.
